STATE OF MICHIGAN

COURT OF APPEALS

DAISY MORTON,

Plaintiff-Appellant,

v

CbyM LIMITED PARTNERSHIP,

Defendant-Appellee.

UNPUBLISHED
February 2, 2006

No. 255150
Oakland Circuit Court
LC No. 03-049496-NO

Before: Sawyer, P.J., and Wilder and H. Hood*, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition in favor of defendant and dismissing her claim with prejudice. We affirm.

Plaintiff, while leaving a Courtyard by Marriott ("CbyM") hotel and heading toward the parking lot, tripped and fell on an uneven brick walkway set in grass, sustaining injury. Plaintiff took this side walkway to get to the parking lot because the regular "horseshoe" driveway at the hotel's exit and entrance, with its regular concrete sidewalk, was crowded by a tour group with its luggage. On appeal, plaintiff argues that the trial court should not have allowed CbyM to avail itself of the open and obvious defense in order to avoid liability for this trip and fall on an uneven brick walkway. Plaintiff claims that genuine issues of material fact exist regarding whether the condition was open and obvious and whether special aspects of the condition rendered it unreasonably dangerous. We disagree.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion brought pursuant to MCR 2.116(C)(10) should be granted when there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996); *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001). A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue on which reasonable minds could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

(2003). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

"In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). A premises owner owes no duty to protect or warn invitees[1] against open and obvious hazards. *Lugo, supra*, pp 516-519. This is not an exception to the duty, but a part of its definition. *Lugo, supra*, p 516. "[W]here the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, the invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee." *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992).

If, however, "special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." *Lugo, supra*, p 517. Under *Lugo*, special aspects analysis requires that there be "*truly* 'special aspects' of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm." *Lugo, supra*, p 517 (emphasis added). Where special aspects make an open and obvious condition unreasonably dangerous, the invitor must take reasonable precautions to protect an invitee from such danger. *Mann v Shusteric Enterprises*, 470 Mich 320, 328-329; 683 NW2d 573 (2004). A "special aspect" might exist where you have: (a) an unavoidable risk such as a single obstructed exit; or (b) "a substantial risk of death or severe injury," such as "an unguarded thirty foot deep pit in the middle of a parking lot." *Lugo, supra*, p 518. A special aspect must involve, in other words, "a uniquely high likelihood of harm or severity of harm" in order to avoid the open and obvious bar. *Lugo, supra*, p 519.[2]

We conclude, first, that the hazard at issue here was open and obvious. By plaintiff's own admission, she had seen the grass and pine needles in between the bricks of the walkway. The photographs clearly show that the bricks are not contiguous but are separated by gaps. Although plaintiff argues that she did not see that there were gaps between the bricks, it is so clear from the photographs that there are gaps between the bricks that an ordinarily prudent person would notice on casual inspection. Viewing the evidence in a light most favorable to plaintiff, no reasonable jury could conclude otherwise, and therefore, there is no genuine issue of material fact regarding the open and obvious character of the danger posed by the brick walkway.

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[1] There is no dispute that plaintiff was an invitee.

[2] The question of uniquely dangerous potential for severe harm is analyzed "a priori," that is, before the incident involved in a particular case. *Lugo, supra*, p 519 n 2.

Plaintiff next argues that special aspects of the brick walkway rendered it unreasonably dangerous, notwithstanding any open and obvious danger, because it was effectively unavoidable as the only available means of going to the parking lot because the main horseshoe driveway at the exit to the hotel was blocked with a crowd of people and their luggage. We disagree.

The trial court observed that plaintiff could simply have walked through the crowd, or waited for the crowd to disperse. In addition, a person departing from the hotel could have avoided the brick walkway altogether by walking on the grass adjacent to the walkway. The situation facing plaintiff was meaningfully different from the situation described by the *Lugo* Court of a business with only one exit that has water on the floor. *Lugo, supra*, p 518. Here, plaintiff could have exited by either of at least two different ways.

Affirmed.

/s/ David H. Sawyer
/s/ Kurtis T. Wilder
/s/ Harold Hood